

**REMARKS**

Review and reconsideration on the merits are requested.

**Formalities**

Applicants appreciate the Examiner acknowledging receipt of certified copies of the priority documents (there are two priority documents) and returning two initialed Modified PTO/SB/08a forms filed with the Information Disclosure Statements of March 25, 2009 and January 12, 2009.

Applicants now turn to:

**DETAILED ACTION**

**Claim Objections**

Claim 7 is canceled, mooting the objection.

**Use Claims**

Claim 9 is canceled, mooting the rejection of claim 9.

**Claim Rejections - 35 U.S.C. § 112**

Claims 11 and 14 are canceled, mooting the rejection under the first paragraph of 35 U.S.C. § 112.

Claim 13 is canceled, mooting the rejection under the second paragraph of 35 U.S.C. § 112.

**The Prior Art**

JP 11-098978 Yamamoto et al, Machine Translation, referred to as R1 by the Examiner;  
JP H10-045610, Machine Translation, referred to as R2 by the Examiner.

**The Rejections**

Claims 6-14 were rejected under 35 U.S.C. § 102(b) as being anticipated by R1.

Claims 6-14 were rejected under 35 U.S.C. § 103(a) as being unpatentable over R2.

The Examiner's position on the art is set forth in the Action and will not be repeated here except as necessary to an understanding of Applicants' traversal which is now presented.

### **Traversal**

#### **Claim Amendments**

Claim 10 has been amended by limiting the subject matter to be treated to a subject having dry skin. Support is found at page 4, lines 18-22 and in Example 1, particularly from page 17, line 12 - page 18, line 6 of the specification.

New claim 15 has been added; support occurs at page 6, lines 16-22 of the specification.

#### **Traversal of Anticipation Rejection Over R1**

R1 discloses a fermented milk product produced using lactic acid bacteria of the strain *Lactobacillus helveticus* CM4.

The Examiner urges that given that the fermentative activity of *Lactobacillus helveticus* CM4 strain on milk proteins will produce active peptides, a moisturizing effect and filaggrin synthesis promoting effect will be inherent in the fermented products when these products are orally taken in the form of a functional food or purified tripeptides.

However, R1 does not teach that fermented milk whey obtained by fermentation of milk with *Lactobacillus helveticus* has a skin moisturizing effect. Even if the skin moisturizing effect would be inherent in the fermented milk products, one of ordinary skill in the art would not have used the fermented milk whey in a method of moisturizing the skin of a subject having dry skin in the absence of any teaching as above discussed in R1.

As can be seen from Table 4 of the present specification, it has been found for the first time that the fermented milk whey of the present invention (Example 1) has a particularly excellent skin moisturizing effect on dry skin as compared to normal skin.

Specifically, the fermented milk whey according to the present invention does have a skin moisturizing effect on normal skin, where lowering in skin moisture content was inhibited by intake of the fermented milk whey of the present invention compared to a non-fermented milk whey (Comparative Example 2). However, the fermented milk whey exhibits a more superior skin moisturizing effect on dry skin, where the skin moisture content was increased by intake of the fermented milk whey of the present invention.

Thus, for the reasons above, Applicants respectfully submit that claim 10, as amended, is not anticipated by R1, and request withdrawal.

### **Obviousness Rejection Over R2**

Applicants now address the obviousness rejection.

R2 discloses a fermented milk product produced by lactic acid bacteria including *Lactobacillus helveticus*.

The Examiner urges that since *Lactobacillus helveticus* is a proteolytic organism which produces short peptides in media containing milk, the moisturizing and filaggrin synthesizing effects of the fermented products of R2 will be intrinsic when such products are taken orally.

However, R2 does not teach or suggest that fermented milk whey obtained by fermentation of milk with *Lactobacillus helveticus* has a skin moisturizing effect.

Not all short peptides produced by lactic acid fermentation have a skin moisturizing effect, nor is it known whether peptides are the components which contribute to the moisturizing effect. Assuming *arguendo* that the skin moisturizing effect would be inherent in the fermented milk products of R2, one of ordinary skill in the art would not have used the fermented milk whey in a method of moisturizing skin of a subject having dry skin, in the absence of any teaching or suggestion in R2 as above discussed.

Thus, for the first time Applicants have discovered that the fermented milk whey of the present invention has a particularly excellent skin moisturizing effect on dry skin, as compared to normal skin, as can be seen from the results in Table 4 of the specification.

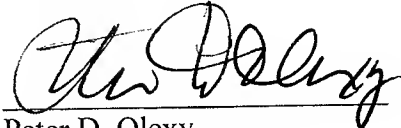
Thus, Applicants respectfully submit that the present invention as set forth in amended claim 10 is not obvious over R2.

Applicants submit as an attachment hereto for the Examiner's consideration a copy of *Perricone v. Medicis Pharmaceutical Corp.*, 432 F.3d 1368, 77 USPQ2d 1321 (Fed. Cir. 2005). The Examiner's attention is directed to note [3] where claims for a method of treating sunburn skin are not inherently anticipated by a prior art patent directed to cosmetic compositions for topical application even though such compositions included various ingredients in concentrations as claimed in the patent in suit. The court reasoned that topical application does not suggest application of lotion to skin sunburn since skin sunburn is not analogous to skin surfaces generally. In the present situation, ingesting the fermented milk whey of the present invention by a subject having dry skin would not be analogous to ingesting by a person having normal skin generally.

In view of the above, reconsideration and allowance of this application are now believed to be in order, and such actions are hereby solicited. If any points remain in issue which the Examiner feels may be best resolved through a personal or telephone interview, the Examiner is kindly requested to contact the undersigned at the telephone number listed below.

The USPTO is directed and authorized to charge all required fees, except for the Issue Fee and the Publication Fee, to Deposit Account No. 19-4880. Please also credit any overpayments to said Deposit Account.

Respectfully submitted,



Peter D. Olexy  
Registration No. 24,513

SUGHRUE MION, PLLC  
Telephone: (202) 293-7060  
Facsimile: (202) 293-7860

WASHINGTON OFFICE

**23373**

CUSTOMER NUMBER

Date: September 14, 2009